BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2019-281-S

IN RE: Application of Palmetto Utilities, Inc. for adjustment of rates and charges for, and modification to certain terms and conditions related to the provision of sewer service.	)	**REPLY TO RESPONSE TO MOTION TO DISMISS PETITION TO INTERVENE OF LISA LEVINE OR, ALTERNATIVELY TO STRIKE INTERVENOR'S PRE-HEARING BRIEFS AS AMENDED AND PRECLUDE PRESENTATION OF TESTIMONY**

Applicant Palmetto Utilities, Inc. ("PUI"), pursuant to S.C. Code Regs. 103-829.A (2012), hereby replies to the June 10, 2020, Response of Intervenor Lisa Levine ("Response") to Applicant's motion for an order dismissing her petition to intervene in the above-captioned docket or, alternatively striking her pre-hearing brief and precluding her from presenting testimony. In support thereof, PUI would respectfully show unto the Commission as follows:

1. Ms. Levine admits that she has failed to pre-file direct testimony. *See* Response at 1 ("Intervenor avers and notes she did not file or request to be filed written testimony"). Accordingly, her averment that, as "a *pro se* Intervenor … she has followed the Commission's guidelines" is demonstrably incorrect based on the record before this Commission and her admission. Moreover, Ms. Levine's first listed statement suggests that the determination of whether to pre-file written testimony and exhibits is a choice available for her to make should she wish to introduce this type of evidence. It is decidedly not. *See* S.C. Code Regs. 103-845.C.[1]

[1] "In proceedings involving utilities, the Commission **shall require** any party and the Office of Regulatory Staff to file **copies of testimony and exhibits** and serve them on all other parties of record **within a specified time in advance of the hearing**." *Id.* (Emphasis added.)

2. Contrary to Ms. Levine's suggestion otherwise, Response at 1-2, PUI does not seek to have her precluded from testifying in the hearings in this matter. To the contrary, PUI's motion only seeks to have her precluded from testifying should she be permitted to continue participating in this proceeding as a party of record. If Ms. Levine's intervention is dismissed, PUI acknowledges that she will no longer be a party of record and would be permitted to testify as would any other customer of the Company – subject of course to the same limitations the Commission places on testimony offered by other customers

3. Although she relies upon it as a basis for her putative right to submit a "pre-hearing brief" (in each of the three versions filed), Ms. Levine now disavows Commission Order No. 2020-33H, claiming it to be "inapposite" because that order "relates only to the provision of pre-filed testimony as well as proposed and final orders." Response at 2. After (yet again) having contradicted herself in these two assertions, Ms. Levine then contends that her "failure to abide by the Hearing Officer's deadline" cannot have resulted in prejudice to PUI. A party's procedural due process rights are prejudiced by the refusal of another party to comply with a mandatory filing deadline under R.103-845.C to submit evidence and subsequent unilateral "amendments" to a non-compliant submission filed after that deadline are no less prejudicial. Regardless, Ms. Levine's current position appears to be that, because she filed her original "pre-hearing brief" within the time frame contemplated by Order No. 2020-33H for pre-filed testimony and exhibits, her failure to pre-file testimony and exhibits in accordance with the Commission's express instructions is excusable. PUI submits that the Commission's regulations and orders apply to Ms. Levine just as they apply to the other parties of record, she has previously been warned by the Commission that compliance with same by her is required, and no amount of course reversal or rationalization on the part of Ms.

Levine can or should be accepted to alter these rules and regulations for her benefit and to the detriment of PUI.

4. Ms. Levine's reliance on Rule 37, SCRCP, Response at 2, is misplaced for two reasons. First, in this context the SCRCP have no application as PUI's motion does not involve matters of computation of time, subpoenas, or discovery. *Cf.* S.C. Code Regs. 103-831, 103-832, and 103-835 (2012). To the contrary, the Commission has adopted its own Rules of Practice and Procedure in RR. 103-800, *et seq*. and the concomitant rules of the SCRCP have no application. *See* Rule 81, SCRCP. *Cf.* Rule 68, RPALC. Second, Ms. Levine's argument necessarily assumes that she is a party. If the Commission grants the motion to dismiss her intervention, she would not be a party and Rule 37 could have no bearing even if it were otherwise applicable.[2]

5. Ms. Levine's selective recitation of the first three sentences of R. 103-845.C, Response at 3, ignores the fourth sentence which mandates that she pre-file her testimony as directed by the Commission in this case involving a utility – an obligation she readily admits she has not met. *See* n. 1, *supra*. "Regulations are interpreted using the same rules of construction as statutes." *See Kiawah Development Partners, II. v. S.C. Department of Health and Environmental Control*, 411 S.C. 16, 39, 766 S.E.2d 7070, 721 (2014). (Internal citation omitted.) Accordingly, the plain and unambiguous language of R.103-845.C must be given effect and its clear and definite meaning applied. *Id.* And that meaning is that Ms. Levine was required to prefile testimony and exhibits. The requirement for prefiling of testimony in this case is not a matter of practicability as

[2] Ms. Levine's reliance upon *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996) is likewise misplaced because it involves the application of the SCRCP in a context that does not apply or exist here. PUI's motion does not involve discovery, the exclusion of an expert witness, or any final dismissal of a matter which precludes a determination with respect to allowable relief – all of which were factors in the decision in *Orlando*. This proceeding to determine PUI's just and reasonable rates will continue regardless of whether Ms. Levine is a party of record and she will be allowed to make a statement under oath as a customer even if this motion is granted.

Ms. Levine would have it by ignoring this plain language, but a matter of compliance with Commission regulations and instructions.

6. Also without merit is Ms. Levine's suggestion that the Commission Hearing Officer failed in discharging a putative obligation to "ask about pre-hearing actions" and to "consider pre-hearing briefs." Response at 3-4. In addition to the fact that she has never raised any matter regarding pre-hearing "actions" or "pre-hearing briefs" to the Hearing Officer, *see* Prehearing Conference Report April 9, 2020, Ms. Levine's criticism of Commission Staff in this regard should also ring hollow with the Commission in view of the fact that there is no provision of the Commission's Rules of Practice and Procedure providing for a "prehearing brief." Thus, it is quite natural that the Hearing Officer would have never raised the concept of a pre-hearing brief. Moreover, and, as already discussed at p.3, ¶ 4, *supra*, the SCRCP, including Rule 16 (c) cited by Ms. Levine, (see Response at 5) can have no application here as it has not been adopted by the Commission.[3]

7. Similarly without merit is Ms. Levine's contention that her "amendments" to her pre-hearing brief are permissible. Response at 4. As she correctly notes, R. 103-828 applies to pleadings. Her "pre-hearing brief" is not a pleading as defined by R. 103-804 and within the ambit of pleadings allowed under R. 103-819 through R. 103-829. Accordingly, her assertion that PUI has not shown good cause to strike her pre-hearing brief under R. 103-828 is without merit. PUI

[3] Ms. Levine's complaint that PUI was permitted to conduct an allowable ex parte briefing in this docket with "no time limitations for it to have done so" (Response at 4) is also no basis for criticism of the Hearing Officer. Not only do time limitations exist under S.C. Code Ann.§58-3-260(C)(6)(a)(vi) regarding the presentation of such a briefing (with which limitations PUI has complied), the choice to request such a briefing is not one that the Commission or its duly appointed Hearing Officer makes. As noted above, Ms. Levine has never requested leave to submit any briefing to the Commission – allowable ex parte or prehearing. Nor is the Company's utilization of a procedure authorized by law an excuse for Ms. Levine's failure to comply with the procedures established by the Commission or to allow her to create her own procedures. And it is certainly not a basis to criticize the conduct of the Hearing Officer in this proceeding.

has, however, demonstrated good cause for striking her "pre-hearing brief" as and to the extent that she seeks to have it introduced into evidence in this case.

8. Contrary to Ms. Levine's assertion otherwise, Commission Order No. 2018-160H, issued October 31, 2018, in Docket No. 2017-370-E only supports PUI's position -- not Ms. Levine's. This is so because that Hearing Officer order establishes the very point that PUI's motion makes: a prehearing brief is not evidence. Ms. Levine was instructed on multiple occasions to comply with the Commission's rules and instructions regarding pre-filing of testimony and exhibits -- which is evidence – and has failed to do so. Moreover, the cited order was issued to require the parties of record in Docket No. 2017-370-E to file prehearing briefs in lieu of opening arguments, not in lieu of testimony and exhibits. And in the instant proceeding, there is no similar Hearing Officer order which has been issued – much less requested by Ms. Levine.

9. Likewise without merit is Ms. Levine's assertion, Response at 5, that S.C. Code Regs. 103-818.C.3 has application here. The instant proceeding is a contested case, not a rulemaking, and the cited regulation only applies in the latter.

10. With respect to Ms. Levine's credentials, while certainly noteworthy in a general sense, they have no bearing on this matter as she is not an expert witness. She seeks to be recognized as a party of record entitled to present evidence in this proceeding. To do so, she is obligated to comply with the provisions of the SCRE, including those relating to inadmissible hearsay. *See R*. 103-846.A. Unlike fact witnesses, expert witnesses (such as Joel Wood whom Ms. Levine mentions at p. 6 of her Response) are entitled to rely upon hearsay statements in formulating their opinions and such statements are admissible into evidence for that purpose. *See* Rule 803(18), SCRE. Ms. Levine is not so entitled.

11. Lastly, other than refusing to substantively respond to PUI's assertion that it has no fiduciary duty to her (Response at 6), Ms. Levine fails to address the several bases upon which PUI argues that her "pre-hearing brief" raises matter which did not form the grounds for her intervention in this proceeding and that dismissal of her intervention will not prejudice her rights or interests for that reason. *See* PUI Motion at pp. 4-6, ¶12. Having failed to do so, the Commission should accept each of PUI's assertions in support of its arguments in this regard.

WHEREFORE, having fully set forth its reply to the response to its motion, PUI requests that its motion, and such other and further relief as the Commission deems just and lawful, be granted. Should Ms. Levine be permitted to continue participating in this proceeding as a party of record, her "pre-hearing brief" should be stricken and not included in the record in this case. Should Ms. Levine not be permitted to continue participating as a party of record, she should be permitted to offer sworn testimony only as a customer and subject to the same limitations applicable to testimony of other customers.

Respectfully submitted,

s/John M. S. Hoefer
John M. S. Hoefer
Andrew R. Hand
WILLOUGHBY & HOEFER, P.A.
930 Richland Street
PO Box 8416
Columbia, SC 29202-8416
Telephone: (803) 252-3300
Facsimile: (803) 256-8062
jhoefer@willoughbyhoefer.com
ahand@willoughbyhoefer.com

Attorneys for Palmetto Utilities, Inc.

Columbia, South Carolina
This 11th day of June, 2020